Other grounds to support the application are that the Industrial Court had ignored certain evidence adduced by the Kuala Lumpur Hilton and had made findings against the weight of the evidence. But these matters are purely matters of fact and under s 33B of the Industrial Relations Act the decision of the Industrial Court on such matters shall be final and conclusive and cannot be called in question in the High Court. Moreover I find that the Industrial Court had not addressed the wrong questions or taken into account irrelevant matters. I find that it had considered all matters which it ought to have taken into account.

The application is dismissed with costs.

Application dismissed.

Solicitors: *TM Varughese & Co; Aziz Abdullah & Co.*

Reported by *Ng Sheau Jiuan*

Yap Sooi Kim v Public Prosecutor

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY CRIMINAL APPLICATION NO CR 54-7-88
ANUAR J
5 SEPTEMBER 1988

Criminal Procedure – Bail pending trial – Dangerous drugs – Offence punishable with imprisonment for more than five years – Punishment that 'may be imposed' and 'can be imposed' by court – Dangerous Drugs Act 1952, ss 39A(2) & 41B(1)(b)

This was an application for an order for bail pending trial. The applicant who was charged with an offence under s 39A(2) of the Dangerous Drugs Act 1952 was refused bail by the sessions judge. In this application she submitted that the court below was erroneously of the view that the offence was non-bailable and contended that the offence was not one which fell within the ambit of s 41B(1)(b).

Held, dismissing the application:

(1) Counsel for the applicant failed to distinguish between punishment that may be imposed and punishment that can be imposed by the court. The punishment that may be imposed is the punishment which the court may decide to impose on the accused after taking into consideration the seriousness of the offence, the antecedent and mitigating factors present. The punishment that a court can impose relates to the power the court has. Under s 39A(2) of the Act the court can impose any punishment between a minimum period of five years and imprisonment for life.

(2) The operative words under s 41B(1)(b) are 'punishable with imprisonment'. This phrase means the power of punishment which the court has under the law and not the punishment which the court may choose to impose.

Legislation referred to
Dangerous Drugs Act 1952 ss 39A(2), 41B(1)(b)

PG Segran for the applicant.
Tan Poh Lai (Miss) (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Anuar J: This is an application by the applicant for an order that she be granted bail pending trial.

The applicant was arrested on 29 September 1987 at about 10.30 am at her house at No 286-G, Sentul Pasar, Kuala Lumpur, after the police found some drugs in the premises. She was subsequently charged with an offence under s 39A(2) of the Dangerous Drugs Act 1952 ('the Act'). On 23 March 1988, she applied for bail pending trial but her application was refused by the learned judge of the Sessions Court.

In her affidavit in support of the application, the applicant stated that the learned judge of the Sessions Court refused to grant bail as the learned judge was of the view that an offence under s 39A(2) of the Act is non-bailable. Such a view, it was submitted by the learned counsel for the applicant, was erroneous. He contended that the present offence is not one which falls within the ambit of s 41B(1)(b) of the Act, that is, the section which relates to bail.

Section 41B(1)(b) reads as follows:

> (1) Bail shall not be granted to an accused person charged with an offence under this Ordinance –
> (a) ...
> (b) where the offence is punishable with imprisonment for more than five years; or
> (c) ...
>
> (2) The provisions of subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.

It was submitted by counsel that under s 41B(1)(b), bail should be refused only in cases wherein the punishment is more than five years. As the offence under s 39A(2) of the Act carries a minimum sentence of only five years, counsel submitted that it can only mean that the accused may be punished with an imprisonment term of only five years and not more. Accordingly, s 41B(1) cannot apply.

It would appear from counsel's interpretation of s 41B(1)(b) that he failed to distinguish between punishment that may be imposed and punishment that can be imposed by the court. The punishment that may be imposed is the punishment which the court may decide to impose on the accused after taking into consideration the seriousness of the offence, the antecedent and mitigating factors present. The punishment that a court can impose relates to the power the court has. Under s 39A(2) of the Act, the court can impose any punishment between a minimum period of five years and imprisonment for life.

With respect, I think the learned counsel has misread the provision of s 41B(1)(b) of the Act when he contended that the restriction on bail does not apply if the accused is sentenced to five years' imprisonment. The operative words under this section are 'punishable with imprisonment'. This phrase means the power of punishment which the court has under the law and not the punishment which the court may choose to impose. As an accused charged with an offence under s 39A(2) of the Act is liable to an imprisonment term for life (five years being the minimum), it is clear that that is an offence within the ambit of s 41B(1)(b) of the Act.

I am therefore of the view that the learned judge of the Sessions Court was right in refusing bail as the offence under s 39A(2) is punishable with imprisonment of more than five years.

For the above reasons, I would dismiss this application.

Application dismissed.

Solicitors: *PG Segran Associates.*

Reported by *Al-Mansor Adabi*

Public Prosecutor v Annamaly a/l Narayanan

HIGH COURT (SEREMBAN) – CRIMINAL APPEAL NO 51-33 OF 1987
MUSTAPHA HUSSAIN J
25 AUGUST 1988

Land Law – Housing developers – Unlicensed housing development affected by collapse of housing market – Demand by purchasers for refund of purchase moneys – Directive issued by Deputy Minister of Housing directing refunds to be made – Failure of housing developer to comply with directive – Whether directive was ultra vires the Housing Developers (Control and Licensing) Act 1966 – Housing Developers (Control and Licensing) Act 1966, ss 11 & 12

The respondent was the managing director of a housing developer company which was engaged in a housing development in Negeri Sembilan without having a licence to do so. The housing market collapsed and the respondent's company could not proceed with the housing scheme. The prospective buyers who had booked the houses demanded a refund of their money and the Deputy Minister of Housing subsequently issued a directive under s 12 of the Housing Developers (Control and Licensing) Act 1966 ('the Act') directing the respondent to make the refunds. The respondent failed to carry out the refunds and was therefore charged in the Magistrate's Court for failure to comply with the Deputy Minister's directive. The learned magistrate acquitted and discharged the respondent, holding that the directive was bad in law as it was not consistent with the scope and objective of s 12 of the Act and was ultra vires the Act. The Public Prosecutor appealed against the learned magistrate's order.

Held, dismissing the appeal:

(1) Section 12 of the Act gives the minister powers to give to a housing developer such directions as he considers 'fit and proper for the purpose of ensuring compliance with the Act ...' However, the provision for the refund of purchase moneys is not found anywhere in the Act, and the refund of moneys cannot by any stretch of the imagination come within the scope of the 'purpose of ensuring compliance with this Act' as found in s 12. The legislature would have spelt out in clear and unequivocal terms if it had that intention.

(2) The proper forum to claim refund of the purchase price would be the courts which, after hearing the case, could decide how much money is to be refunded, how much interest is to be paid in addition and from what date to be so calculated.

Cases referred to

1 *Pemungut Hasil Tanah, Kota Tinggi* v *United Malayan Banking Corporation* [1981] 2 MLJ 264 (folld)
2 *Magor & St Mellons Rural District Council* v *Newport Corporation* [1952] AC 189 (refd)

Legislation referred to

Housing Developers (Control and Licensing) Act 1966 ss 5, 11, 12

Zainal Adzam bin Abdul Ghani (Deputy Public Prosecutor) for the appellant.
Seeralan Ganeshmurugan for the respondent.

Cur Adv Vult

Mustapha Hussain J: The respondent was the managing director of a housing developer company known as Kemajuan Revathy (M) Sdn Bhd with the registered office at No 6 (1st floor) Jalan Sungei, Seremban. The company held a licence issued under s 5 of the Housing Developers (Control and Licensing) Act 1966 (exh P3) to carry out housing development on Lot 2342 Mukim Tebrau in the district of Johore Bahru in the State of Johore over a period of two years from 16 September 1983 to 15 September 1985. The licence was issued on 16 September 1983. The application for the licence was made on 26 February 1983 (exh P2).

The respondent and his company had no licence to carry out any housing development scheme in Negeri Sembilan at all.

However, much earlier than the application and issuance of the licence for the scheme in Mukim Tebrau, the respondent's company was engaged in a housing development project in the Port Dickson area and was collecting deposits and payments by instalments from prospective buyers – all without licence from the Ministry of Housing. Receipts for all these collections were dated from 3 February 1981 to 12 January 1984. Clearly the respondent's company was engaged in housing development and collecting the deposits and instalments without having a licence to do so – as far as the project in Negeri Sembilan was concerned.